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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1975

NO. 75-272 1

JOHN L. WILLIAMS, District Attorney General,
Petitioner,

v.

LILLY MAE ONIE LEE WHITELAW HILLIARD,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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INDEX

	Page
OPINIONS BELOW	2
JURISDICTION	2
QUESTIONS PRESENTED	2
STATUTORY PROVISIONS INVOLVED	3
STATEMENT OF THE CASE	3
REASONS FOR GRANTING THE WRIT	6
CONCLUSION	17

APPENDICES

APPENDIX A — *Lilly Mae Onie Lee Whitelaw Hilliard v. John L. Williams and Donn Clark*, No. 74-1356-58, Opinion, U. S. Court of Appeals, Sixth Circuit, filed 5/28/75 ..... 1a

APPENDIX B — *Lilly Mae Onie Lee Whitelaw Hilliard v. John L. Williams and Donn Clark*, No. 2073, Memorandum Opinion, U. S. District Court, Western District of Tennessee, entered 11/2/73 ..... 18a

APPENDIX C — *John L. Williams v. Lilly Mae Onie Lee Whitelaw Hilliard*, 465 F.2d 1212, *cert. denied*, 409 U.S. 1029, 93 S.Ct. 461, (6th Cir. 1972), Opinion, U. S. Court of Appeals, Sixth Circuit, filed 6/28/72 ..... 38a

CITATIONS

Alzua v. Johnson,
231 U.S. 106 (1913) 10

American Casualty Co. v. Myrick,
304 F.2d 179 (5th Cir. 1962) 12

Barnes v. Dorsey,
480 F.2d 1057 (8th Cir. 1973) 7

Barr v. Mateo,
360 U.S. 564 (1959) 11

Bradley v. Fisher,
13 Wall. 335 (1871) 10

Case v. Morrisette,
475 F.2d 1300 (1973) 9

Dacey v. New York County Lawyers' Assn.,
423 F.2d 188 (1969) 8

Fanale v. Sheehy,
385 F.2d 866 (1967) 8

Franklin v. Skelly Oil Co.,
141 F.2d 568 (10th Cir. 1962) 12

Gregoire v. Biddle,
177 F.2d 579 (2d Cir. 1949) 16

Gruja v. U. S. Lines Co.,
337 F.2d 375 (1964) 9

Guerrero v. Barlow,
494 F.2d 1191 (5th Cir. 1974) 7

Guerro v. Mulhearn,
498 F.2d 1249 (1974) 7

Guzick v. Drebus,
431 F.2d 594 (6th Cir. 1970), *cert. denied*,
401 U.S. 948, 91 S.Ct. 941, 28 L.Ed.2d 231
(1971) 10

Hilliard v. State,
Tenn. Crim. App. 4/15/71, unreported 5

Hilliard v. Williams,
465 F.2d 1212 (6th Cir. 1972), *cert. denied*,
409 U.S. 1029 (1972) 5

Holton v. Boman,
493 F.2d 1176 (1974) 8

Imbler v. Pachtman,
500 F.2d 1301 (9th Cir. 1974), *cert. granted*,
___ U.S. ___, 95 S.Ct. 1324, 43 L.Ed.2d 423
(1975) 6, 17

Jellison v. Kroger Co.,
290 F.2d 183 (6th Cir. 1961) 13

John v. Hurt,
489 F.2d 786 (1973) 8

Kauffman v. Moss,
420 F.2d 1270 (3rd Cir. 1970) 7

Monroe Auto Equipment Co. v. Superior Industries, Inc.,
332 F.2d 473 (1964), *cert. denied*,
379 U.S. 901, 85 S.Ct. 190, 13 L.Ed.2d 175 .. 9

Moore v. Chesapeake & Ohio R. Co.,
340 U.S. 573, 71 S.Ct. 428, 95 L.Ed. 547 (1951) 12

New West Transport Corp. v. S/S Angelina,
410 F.2d 1147 (1969) 9

Parke-Davis & Co. v. Stromsodt,
411 F.2d 1390 (1969) 9

Pennsylvania R.R. v. Chamberlain,
288 U.S. 333, 53 S.Ct. 391, 77 L.Ed.819 (1932) 13

Pierson v. Ray,
386 U.S. 547 (1967) 11, 15

Scheuer v. Rhodes,
416 U.S. 232, 94 S.Ct. 1683, 40 L.Ed.2d 90
(1974) 11

Speyer, Inc. v. Humble Oil & Refining Co.,
403 F.2d 766 (1968), *cert. denied*,
394 U.S. 1015, 89 S.Ct. 1634, 23 L.Ed.2d 41 9

Tyler v. Witkowski,
511 F.2d 449 (1975) 8
U. S. v. 79.95 Acres of Land,
459 F.2d 185 (1972) 9
Wood v. Strickland,
___ U.S. ___, 95 S.Ct. 992, 43 L.Ed.2d 214
(1975) 11
Yaselli v. Goff,
12 F.2d 396 (2d Cir. 1926), *affirmed*,
275 U.S. 593 (1927) 10, 15

STATUTES AND OTHER AUTHORITIES

Statutes:

28 U.S.C., Sec. 1254 (1) 2

42 U.S.C., Sec. 1983 ..... 3, 8, 11

Fed. R. Civ. P. 52(a) 3, 9

Authorities

Prosser, Law of Torts (4th Ed. 1971) 11, 12

30 Am.Jur. 2d, *Evidence*, Sec. 1081 12

30 Am.Jur. 2d, *Evidence*, Sec. 1121 12

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1975

NO. _____

JOHN L. WILLIAMS, District Attorney General,
Petitioner,

v.

LILLY MAE ONIE LEE WHITELAW HILLIARD,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

The Petitioner, John L. Williams, District Attorney General for the Twenty-Second Judicial District of Tennessee, respectfully prays that a writ of *certiorari* issue to review the judgment and opinion of the United States Court of Appeals for the Sixth Circuit entered in this proceeding on May 28, 1975.

OPINIONS BELOW

The opinion of the Sixth Circuit, ___ F.2d ___, not yet reported, is reproduced as Appendix A. The memorandum opinion of the United States District Court for the Western District of Tennessee is not reported and is reproduced here as Appendix B. The opinion of the Sixth Circuit in an earlier appeal of one aspect of this litigation, reported in 465 F.2d 1212, is here reproduced as Appendix C. *Certiorari* was denied in that appeal in 409 U.S. 1029, 93 S.Ct. 461, 34 L.Ed.2d 322.

JURISDICTION

Jurisdiction is invoked under 28 U.S.C., Sec. 1254(1). The judgment of the United States Court of Appeals for the Sixth Circuit was entered on May 28, 1975. This petition for *certiorari* is timely filed within ninety (90) days of that date.

QUESTIONS PRESENTED

The first issue presented is the immunity of a District Attorney General from a Civil Rights Act suit for money damages based upon an allegation by the plaintiff that the prosecutor presented perjured testimony in her prior criminal prosecution.

The second issue presented is the disregard by the Court of Appeals of the District Court's findings of fact and the rendering of an opinion based upon findings of fact in direct conflict with the District Court's findings.

The third issue presented is the speculation and conclusion by the Court of Appeals that plaintiff's conviction

in a prior criminal trial was the result of the introduction of alleged perjured testimony.

STATUTORY AND RULE PROVISIONS INVOLVED

42 United States Code Sec. 1983:

> "Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress."

Federal Rules of Civil Procedure, Title 28, United States Code:

Rule 52(a).

> ". . . Findings of fact shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge the credibility of the witnesses. . . ."

STATEMENT OF THE CASE

On February 19, 1970, Ernie Price died in Carroll County, Tennessee, as a result of axe and shotgun wounds. It appeared that the deceased had been struck in the head with an axe while he was in his house and his body dragged outside, where a shotgun was positioned between his legs and the muzzle placed under his chin or in his mouth and discharged. Officers, upon arriving at the scene, found

that the axe had been washed and that the room in the house had been cleaned.

Upon finding one of the shoes of plaintiff Hilliard near the body, the officers located plaintiff at a nearby house and noted that her clothes were wet. After being arrested, plaintiff stated that she had been involved in a controversy with the decedent, with whom she resided at the time (along with the aged, feeble wife of decedent), over an interest in farm land owned by the decedent. Plaintiff further stated that the deceased had chased her with a shotgun and that she had lost one of her shoes as she fled from him. She stated that she heard a shotgun blast as she ran away to a neighbor's home.

Upon investigation the officers found spots on a curtain in the house and upon a jacket worn by plaintiff. Plaintiff stated that the spots were blood, but from a hog which had been dressed.

Defendant Donn Clark, an agent for the Tennessee Bureau of Criminal Identification, forwarded the curtains and jacket to the F.B.I. laboratory in Washington through the Nashville office of the T.B.I. Some time later the items were returned with a report stating, "No blood identified" on the items. Defendant Clark and the Sheriff, without consulting petitioner Williams, the District Attorney, attempted to resubmit the articles for a more thorough analysis, again through the Nashville T.B.I. office.

As the day of the trial approached, defendant Clark briefly discussed the matter with petitioner Williams who advised Clark not to refer in his testimony to the articles unless called upon to do so. At the trial Clark was questioned about the spots on the curtains and jacket, their

appearance, and plaintiff's statement that the spots were hog blood. The F.B.I. report was not mentioned.

Plaintiff was convicted of second degree murder on May 12, 1970, and was sentenced to twenty years imprisonment. On May 28, 1970, the F.B.I. reported that the stains on the curtain were paint or varnish. The jacket had inadvertently never been resubmitted to Washington from Nashville.

On April 15, 1971, the Tennessee Court of Criminal Appeals reversed the conviction on the grounds that the evidence was unconvincing and that gruesome photographs of the victim had been exhibited to the jury (***Hilliard v. State***, Tenn.Crim.App. 4/15/71, unreported).

In May of 1971 plaintiff was retried and acquitted in a trial which differed from the first trial in many significant particulars (see Appendix B, p. 24a).

On May 11, 1971, plaintiff filed an action in the United States District Court alleging that defendants Clark and petitioner Williams had committed perjury, suborned perjury and suppressed evidence. The Court granted the motion of petitioner Williams to dismiss on the basis of immunity. The Sixth Circuit reversed the dismissal and remanded for trial. ***Hilliard v. Williams***, 465 F.2d 1212, ***cert. denied***. 409 U.S. 1029 (1972).

At the trial, the District Court found that petitioner had not committed any act which deprived plaintiff of any civil right but awarded plaintiff damages of One Dollar (Appendix B).

Plaintiff appealed, alleging that the damages awarded her were insufficient. Defendants appealed, contending that the award of nominal damages was unwarranted in

light of the Court's finding that defendants had not violated plaintiff's rights in any regard.

The Sixth Circuit reversed, holding that plaintiff had shown a violation of her civil rights, and remanded for a determination of plaintiff's damages, although suggesting that the Trial Court postpone further proceedings until this Court announces its opinion in ***Imbler v. Pachtman***, 500 F.2d 1301 (9th Cir. 1974), ***cert. granted***, 95 S.Ct. 1324, 43 L.Ed.2d 423.

REASONS FOR GRANTING THE WRIT

I.

The decision of the Sixth Circuit conflicts with other Courts of Appeal.

A. SCOPE OF IMMUNITY OF PROSECUTING ATTORNEYS

The Courts of Appeal in all circuits which have ruled upon the question have granted immunity to a prosecutor from suits brought against him for acts committed "in the performance of duties constituting an integral part of the judicial process" or "within the scope of his prosecutorial function." However, the Sixth Circuit differs from other Courts of Appeal in its interpretation of the phrases "integral part of the judicial process" and "prosecutorial function."

In ***Imbler v. Pachtman***, 500 F.2d 1301 (1974), ***cert. granted***, ___ U.S. ___, 95 S.Ct. 1324, 43 L.Ed.2d 423[1]

[1] **Imbler** involves the identical question presented in the instant case. Petitioner submits that, should **certiorari** be granted, this case should be consolidated with **Imbler**.

the Ninth Circuit granted immunity to a prosecutor from a suit alleging that he had knowingly and maliciously used perjured testimony to secure plaintiff's conviction in a prior criminal trial. The court further stated that the acts alleged "occurred during prosecutorial activity which can only be characterized as an 'integral part of the judicial process.'" [2]

In ***Kauffman v. Moss***, 420 F.2d 1270 (1970), the Third Circuit held that a prosecuting attorney was acting within his jurisdiction in bringing a criminal charge against plaintiff and was therefore immune regardless of the allegation that plaintiff's conviction was the result of perjured testimony.

In ***Guerrero v. Barlow***, 494 F.2d 1190 (1974), the Fifth Circuit held that an allegation that a prosecutor denied plaintiff supplementary police reports and thereby handicapped his defense preparations did not allege acts which were outside the immunity which surrounded the prosecutor's official acts.

In ***Barnes v. Dorsey***, 480 F.2d 1057 (1973), the Eighth Circuit ruled that alleged suppression of a police report which would have purportedly helped to establish plaintiff's innocence was an act which may be characterized as prosecutorial rather than investigatory.

The First Circuit granted an absolute immunity to prosecutors but qualified it to the extent that it does not include acts unrelated to the judicial process (such as wiretapping).[3]

The Second Circuit has stated that a public prosecutor possesses the same immunity in an action which seeks to

[2] 500 F.2d 1302.

[3] **Guerro v. Mulhearn**, 498 F.2d 1249 (1974).

hold him personally liable for official acts under 42 U.S.C., Sec. 1983, as he does to a similar action for malicious prosecution.[4]

The Seventh Circuit has granted immunity to prosecutors but has qualified that immunity and limited it to the scope of the prosecutorial function.[5]

The Sixth Circuit in the instant case has departed from the law of the other circuits and has ruled that the conduct of a prosecuting attorney during a trial is now open to attack and subsequent liability.[6] The Sixth Circuit has ruled that the decisions made by a prosecuting attorney during the course of a trial are not cloaked with immunity but, to the contrary, render him personally liable in the event of a conviction and subsequent acquittal of a plaintiff.

The obvious departure of the Sixth Circuit from the law of the other circuits makes it clear that there exists a conflict between the circuits which this Court should resolve.

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[4] **Dacey v. New York County Lawyers' Assn.**, 423 F.2d 188 (1969). See also **Fanale v. Sheehy**, 385 F.2d 866 (1967).

[5] **Tyler v. Witkowski**, 511 F.2d 449 (1975).
Holton v. Boman, 493 F.2d 1176 (1974).
John v. Hurt, 489 F.2d 786 (1973).

[6] The issue of the immunity of a prosecuting attorney was previously decided in this case in **Hilliard v. Williams**, 465 F.2d 1212 (1972), **cert. denied**, 409 U.S. 1029, 93 S.Ct. 461, 34 L.Ed.2d 322. However, petitioner Williams points out that the prior decision of the Sixth Circuit and the denial of **certiorari** by this Court were made at the pleading stage of this litigation. There has since been a full evidentiary hearing upon which petitioner Williams now relies as a basis for his immunity.

B. DISREGARD OF THE COURT OF APPEALS OF THE FINDINGS OF FACT BY THE TRIAL COURT

Although the Sixth Circuit stated in the instant case that "we are unable to agree with several of the court's conclusions of law,"[7] the Court actually disagreed with the Trial Court's findings of fact. The Trial Court found:

> "7. Neither of the defendants jointly or severally suppressed any evidence, committed or suborned perjury, or otherwise committed any act or were guilty of any omission which deprived Mrs. Hilliard of any rights guaranteed her by the Constitution of the United States or any Federal statute."[8]

The Sixth Circuit, although not charged with the responsibility of determining the facts, substituted its judgment for that of the Trial Court, who had the opportunity to observe all of the witnesses, their manner and demeanor, and their credibility.

Rule 52 of the Federal Rules of Civil Procedure provides, in pertinent part, that: "Findings of fact shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge the credibility of the witnesses."

The Courts of Appeal in all the circuits have long recognized and have faithfully applied this rule.[9] The Sixth

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[7] Appendix A, page 9a.

[8] Appendix B, page 29a.

[9] Second Circuit - **Gruja v. U.S. Lines Co.**, 337 F.2d 375 (1964); Third Circuit - **Speyer, Inc. v. Humble Oil & Refining Co.**, 403 F.2d 766 (1968), **cert. denied**, 394 U.S. 1015, 89 S.Ct. 1634, 23 L.Ed. 2d 41; Fifth Circuit - **New West Transport Corp. v. S/S Angelina**, 410 F.2d 1147 (1969); Eighth Circuit - **Parke-Davis & Co. v. Stromsodt**, 411 F.2d 1390 (1969); Ninth Circuit - **Monroe Auto Equipment Co. v. Superior Industries, Inc.**, 332 F.2d 473 (1964), **cert. denied**, 379 U.S. 901, 85 S.Ct. 190, 13 L.Ed.2d 175; Tenth Circuit - **U. S. v. 79.95 Acres of Land**, 459 F.2d 185 (1972); D. C. Circuit - **Case v. Morrisette**, 475 F.2d 1300 (1973).

Circuit, however, has modified that rule to provide that the Court of Appeals, when dealing with questions of constitutional magnitude, is not required to accept fact trier's findings merely because it considers them not clearly erroneous. *Guzick v. Drebus*, 431 F.2d 594 (1970), *cert. denied*, 401 U.S. 948, 90 S.Ct. 941, 28 L.Ed.2d 231.

Without commenting upon the propriety of that modification of Rule 52, petitioner respectfully submits that the instant case is not of constitutional magnitude and this modification is therefore not applicable.

The Sixth Circuit's disregard of the findings of fact by the Trial Court represents an irreconcilable conflict with the law of the other circuits.

II.

The decision of the Sixth Circuit is in conflict with applicable decisions of this Court and is a departure from settled case law.

A. IMMUNITY OF PROSECUTING ATTORNEY

This Court has historically recognized immunity for judges and others closely associated with the judicial process to protect them from the threat of damage suits for acts performed within the scope of their judicial or quasi-judicial functions.

In *Yaselli v. Goff*, 12 F.2d 396 (1926), the Second Circuit reviewed the authorities concerning the immunity of a prosecutor and concluded that a prosecutor enjoyed absolute immunity even though he may have acted maliciously. This Court, citing *Bradley v. Fisher*, 13 Wall. 335, 347, and *Alzua v. Johnson*, 231 U.S. 106, 111, affirmed in 275 U.S. 593 (1927).

In *Pierson v. Ray*, 386 U.S. 547, 554 (1967), this Court found that there was no evidence that "Congress meant to abolish wholesale all common law immunities" in enacting 42 U.S.C. 1983 and that the immunity of judges from liability for damages for acts committed within their judicial jurisdiction was applicable in actions brought under the Civil Rights Act.

In *Barr v. Matteo*, 360 U.S. 564 (1959), this Court held that allegations of malice in a libel complaint do not destroy the immunity of a public official when the actions complained of were "within the outer perimeter of petitioner's line of duty."

This Court has also recently approved a qualified official immunity from damage actions under the Civil Rights Act against state executives[10] and school officials.[11]

The opinion of the Sixth Circuit in the instant case is a departure from the time-honored decisions of this Court and an aberration in settled case law.

B. SPECULATION ABOUT CAUSATION

It is a firmly established principle of our jurisprudence that a tortfeasor is held responsible only for damage which bears some reasonable connection to the alleged acts or omissions of the tortfeasor.

Prosser, Law of Torts (4th Ed., 1971), at page 236, states the general rule in this manner:

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[10] **Scheuer v. Rhodes**, 416 U.S. 232, 94 S.Ct. 1683, 40 L.Ed.2d 90 (1974)

[11] **Wood v. Strickland**, ___ U.S. ___, 95 S.Ct. 992, 43 L.Ed.2d 214 (1975).

"An essential element of the plaintiff's cause of action for . . . any . . . tort is that there must be some reasonable connection between the act or omission of the defendant and the damage which plaintiff has suffered.

* * *

". . . an act of omission is not regarded as a cause of an event if the particular event would have occurred without it." (p.239)

30 Am.Jur.2d, ***Evidence***, Sec. 1081, p. 228, provides that a judgment may not be based merely on conjecture, suspicion, surmise,[12] supposition or speculation.[13]

30 Am.Jur.2d, ***Evidence***, Sec. 1121, p. 288, states that:

"The evidence must not leave the causal connection a matter of conjecture; it must be something more than consistent with plaintiff's theory as to how the accident occurred. Where the proof of causal connection is equally balanced, or the facts are as consistent with one theory as another, plaintiff has not met the burden which the law casts upon him . . . . In other words, if the cause of an injury may be as reasonably attributed to an act for which the defendant is not liable as to one for which he is liable, the plaintiff has not sustained the burden of proving that his injury is the direct result of defendant's negligence."

Persons who perpetrate torts are, as a general rule, responsible and only responsible for the proximate

[12] **American Casualty Co. v. Myrick**, 304 F.2d 179 (5th Cir. 1962); **Franklin v. Skelly Oil Co.**, 141 F.2d 568 (10th Cir. 1944).

[13] **Moore v. Chesapeake & Ohio R. Co.**, 340 U.S. 573, 71 S.Ct. 428, 95 L.Ed. 547 (1951).

consequences of the wrongs they commit. ***Jellison v. Kroger Co.***, 290 F.2d 183, 185 (6th Cir. 1961).

This Court, in ***Penn. RR v. Chamberlain***, 288 U.S. 333, 339, 53 S.Ct. 391, 393, 77 L.Ed. 819 (1932), held, on different facts, that:

"We, therefore, have a case belonging to that class of cases where proven facts give equal support to each of two inconsistent inferences; in which event, neither of them being established, judgment as a matter of law, must go against the party upon whom rests the necessity of sustaining one of these inferences as against the other, before he is entitled to recover."

The Trial Court in the instant case found a substantial amount of circumstantial evidence presented at the first trial of plaintiff which strongly indicated the guilt of plaintiff, entirely apart from the items of evidence allegedly suppressed by defendant.[14] Further, the Trial Court found at least four substantial differences in the evidence presented at the first and second trials of plaintiff.[15]

Consequently, the Trial Court found that:

"It would amount to speculation and surmise for the court to conclude that the absence (whether deliberate or otherwise) of the F.B.I. report of March 26, 1970, or the absence of the curtains and jacket, effected (sic)

[14] Appendix B, p. 24a. Some of these items were motive, opportunity, prior controversy with deceased, plaintiff's shoe being found within a few feet of deceased, conduct of plaintiff after crime, ability and strength of plaintiff and inconsistent statements of plaintiff.

[15] Appendix B, p. 26a-27a. Four of these differences were introduction of gruesome photographs, absence of testimony of deceased's family, absence of testimony of deceased's sons, and different testimony of plaintiff.

the outcome of the May, 1970, trial. There was considerable evidence to warrant a finding of guilty on the record in any event."[16]

Further, the Trial Court concluded that the reversal of the first trial was due largely to the admission of gruesome photographs.[17] As a matter of fact, the Tennessee Court of Criminal Appeals expressly stated that the alleged suppression of the F.B.I. report was not properly before that Court since plaintiff (defendant therein) had not brought that to the attention of the state trial court in her motion for a new trial.[18]

The Sixth Circuit, however, stated that proximate causation is analyzed in terms of foreseeability of the injury and ruled that the injury in the instant case was not only foreseeable but the actual result intended.[19] The Court, although distinguishing proximate causation from causation in fact, then analyzed this case in terms of causation in fact.

The Court then enunciated a rule of causation which departed from settled case law by ruling that ". . . plaintiff need only show by a preponderance of the evidence that defendant's conduct was a substantial factor in bringing about the injuries suffered."[20]

Such statement immediately followed the Court's statement that: "No one can ever be certain that Hilliard would

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[16] Appendix B, p. 30a.

[17] Appendix B, p. 30a.

[18] Appendix A, p. 7a.

[19] Appendix A, p. 15a.

[20] Appendix A, p. 16a.

not have been convicted if defendants had acted properly in all respects."[21]

Such a holding, whether it be based upon proximate causation or causation in fact, is contrary to the settled principles of case law in the United States and is an aberration in the law of legal causation.

III.

The decision of the Sixth Circuit raises important questions of Federal law which have not been, but should be, settled by this Court.

Although this Court has ruled upon the immunity of a prosecuting attorney, it has done so only in the *per curiam* affirmance of *Yaselli v. Goff*, *supra*.

This Court decided the immunity of state judges from damage actions under the Civil Rights Act in *Pierson v. Ray*, *supra*.

The immunity of a state prosecutor should now be examined. Although the Sixth Circuit has held that a prosecutor is not immune from acts which do not constitute an integral part of the judicial process, no guidelines are specified and the scope of the phrase "judicial process" is not defined.

Without a definitive opinion on the scope and limits of a prosecutor's immunity, prosecutors will be called upon to defend every action brought against them which contains allegations of acts "outside the scope of judicial process." Astute "jailhouse lawyers," merely by the insertion into

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[21] Appendix A, p. 16a.

their complaints of a few words, can now compel prosecutors to go to the expense, trouble and time of defending themselves in civil actions.

Prosecutors will now be called upon to try criminal cases at least twice—the original prosecution and their own subsequent "prosecution." By the addition to their complaint of the words "perjury" or "suppression of evidence," every dissatisfied inmate (and most inmates are vehemently dissatisfied) can now retaliate by bringing his prosecutor into court. Even if there is no merit whatsoever to the allegations made, the prosecutor will be required to go through the time-consuming rigors of trial. Such a situation will place an intolerable burden upon our already overworked system of criminal justice.

Judge Learned Hand, in *Gregoire v. Biddle*, 177 F.2d 579 (2nd Cir. 1949) eloquently stated the solution to this problem in this manner:

> "It does indeed go without saying that an official, who is in fact guilty of using his powers to vent his spleen upon others, or for any other personal motive not connected with the public good, should not escape liability for the injuries he may so cause; and, if it were possible in practice to confine such complaints to the guilty, it would be monstrous to deny recovery. The justification for doing so is that it is impossible to know whether the claim is well founded until the case has been tried, and that to submit all officials, the innocent as well as the guilty, to the burden of a trial and to the inevitable danger of its outcome, would dampen the ardor of all but the most resolute, or the most irresponsible, in the unflinching discharge of their duties. Again and again the public interest calls for action which may turn out to be founded on a mistake,

> in the face of which an official may later find himself hard put to it to satisfy a jury of his good faith. There must indeed be means of punishing public officers who have been truant to their duties; but that is quite another matter from exposing such as have been honestly mistaken to suit by anyone who has suffered from their errors. As is so often the case, the answer must be found in a balance between the evils inevitable in either alternative. In this instance it has been thought in the end better to leave unredressed the wrongs done by dishonest officers than to subject those who try to do their duty to the constant dread of retaliation. Judged as res nova, we should not hesitate to follow the path laid down in the books."

CONCLUSION

The decision of the Sixth Circuit in the instant case is in conflict with the decisions of the other circuits, the rulings of this Court, and the settled case law of this country. The instant case provides a good vehicle for this Court to consider problems of monumental concern to our system of criminal justice.

The remand to the Trial Court from the Sixth Circuit directs the Trial Court to ascertain plaintiff's damages but suggests that the case should be delayed until this Court rules in *Imbler*, *supra*, in which *certiorari* has been granted. However, should this Court affirm *Imbler*, the Trial Court would nonetheless be powerless to grant the *Imbler* immunity to Williams because of the directions in the remand order. Therefore, a denial of the petition for *certiorari* in this case and an affirmance by this Court of *Imbler v. Pachtman*, *supra*, if same should happen, would

result in a situation in which prosecutors in the Ninth Circuit, and others, would be completely immune from civil rights damage actions while petitioner in the instant case is held personally liable for the same alleged acts.

Respectfully submitted,

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APPENDIX A

Nos. 74-1356-58

UNITED STATES COURT OF APPEALS
For the Sixth Circuit

LILLY MAE ONIE LEE WHITELAW HILLIARD,
Plaintiff-Appellant,
v.
JOHN L. WILLIAMS and DONN CLARK,
Defendant-Appellees.

APPEAL from the United States District Court for the Western District of Tennessee, Eastern Division.

Decided and Filed May 28, 1975

Before: PHILLIPS, Chief Judge, EDWARDS, Circuit Judge, and O'SULLIVAN, Senior Circuit Judge.

PHILLIPS, Chief Judge. This appeal grows out of an action brought by plaintiff Hilliard under 42 U.S.C. §§ 1983, 1985 against District Attorney General John L. Williams and against Donn Clark, an agent of the Tennessee Bureau of Criminal Identification. The complaint alleged that the defendants withheld exculpatory evidence and presented false and misleading testimony at Mrs. Hilliard's criminal trial on the charge of murder. After a nonjury trial,

the District Court awarded nominal damages of $1 each against Williams and Clark and costs against Williams. All of the parties appealed to this court. For the reasons stated below, we reverse and remand for further proceedings.

In late 1969, Mrs. Hilliard came to Tennessee from her home in Indiana to obtain her share of land that she held in common

[2]

with her aunt, Vina Price. Ernie Price, the husband of Vina Price, disputed Mrs. Hilliard's claim to the land, and Mrs. Hilliard retained an attorney to protect her interest.

On February 19, 1970, Ernie Price died from the effects of two axe blows and a shotgun wound to the head and mouth. It appeared that Mr. Price had been murdered inside his home and the body thereafter dragged outside. One of Mrs. Hilliard's shoes was found near the scene of the crime. According to Mrs. Hilliard, just before the murder Mr. Price had threatened her with a shotgun, and she fled toward a neighbor's house, losing the shoe in the process. She claimed to have heard a shotgun blast while running. Upon arriving at the neighbor's home, she telephoned her attorney, who in turn called the authorities.

Later that day Mrs. Hilliard was arrested. Defendant Clark, who had been assigned to investigate the murder, seized as evidence a curtain from the Price home and the jacket Mrs. Hilliard was wearing when arrested, both of which contained small stains that Clark thought might be blood. Clark sent the curtain and the jacket to the F.B.I. laboratory in Washington for analysis of the stains. In late March of 1970, the F.B.I. returned both items and

submitted a report stating: "No blood was identified on Q1 [jacket] or Q2 [curtain]." Agent Clark considered the report inconclusive and sent the jacket and curtain to Nashville to be forwarded back to the F.B.I. for further analysis. Unknown to either defendant, the jacket for some reason never left Nashville. On May 28, 1970, the F.B.I. reported that the stains on the curtain were composed of paint or varnish.

Before Mrs. Hilliard's murder trial began on May 12, 1970, the defendants discussed the first F.B.I. report at least twice. Williams instructed Clark not to mention the report in his testimony unless specifically questioned about it. Defendant Williams did not reveal the contents of the report to Mrs. Hilliard or to her attorney. To the contrary, in his capacity as

[3]

prosecuting attorney he allowed the following testimony to be elicited from Agent Clark without correction or explanation:

DIRECT EXAMINATION BY GEN. SMITH:

Q 66 Did you proceed to inspect the living room furniture then?

A Yes sir, I found what looked to be blood stains on the arm of the arm chair, on the north side of the house, sort of behind the stove, —

Q 67 All right, go ahead?

A Also found blood stains on the floor in front of the chair, and some on the curtains behind the stove, then on the back of the couch on the north wall of the living room, the wall looked wet, as if it had been washed behind the couch there.

Q 108 Now, did the defendant continue to remain

in the Sheriff's car while you all made the investigation?

A Yes, she stayed in the back seat of the sheriff's car.

Q 109 Now, did you take a picture of her?

A Yes. (shows photo)

Q 110 Was that the way she was dressed when you took the picture of her?

A Yes, that was made at the jail.

Q 111 What kind of coat is that?

A A blue nylon windbreaker type coat.

Q 112 All right, did you find any blood stains on that?

A Yes sir, I found some spots on it.

Q 113 What did they appear to be?

A They appeared to be blood stains.

Q 114 Where were they?

A They were on the right tail of the coat, right front of the coat.

CROSS-EXAMINATION BY MR. MADDOX:

Q 55 Was there any indication of any blood stains on the floor where the water was?

[4]

A No sir, —on the edge of where the water was is where you could see the blood stains.

Q 56 Now, how do you know it was blood stains?

A That is what it looked to me like.

Q 57 Did you have it examined to see what it was?

A No, I didn't have it analyzed.

Q 58 Did you have anything analyzed off the couch to determine if it was blood?

A No sir.

Q 59 Did you have the curtains analyzed?

A I sent them off to the FBI lab and they aren't back yet.

Q 60 You don't have the curtains back?

A No, sir.

Q 61 Lets talk about this jacket, —you put in some very dangerous evidence against the defendant, by saying she had blood-stains on her jacket, —do you know they were blood stains?

A I said they looked like blood stains.

Q 62 How large were they, Mr. Clark?

A They were small, —

Q 63 Pin point weren't they?

A No, they were bigger than pin point?

Q 64 Well, were they as large as a dime?

A No sir, not as large as a dime.

Q 65 Were they as large as half a dime?

A Yes sir, —

Q 66 Now, Mr. Clark, be sure about it?

A Yes, they were as large as half a dime.

Q 67 How many spots were on the jacket?

A About 3 or 4, scattered, —

Q 68 Scattered where?

A Up on the right side of the tail of the coat.

Q 69 Were there any on the back?

A I didn't see any.

Q 70 Mr. Clark, where is that jacket today?

A At the FBI Lab in Washington.

Q 71 Why didn't you make it available here for us

[5]

so that the jury could see those spots on that jacket and determine if it was blood?

A They just didn't send it back.

Q 72 Have you had any reports that that was human

blood on that jacket?

A No, not at this time.

Q 73 But you don't know what was on that jacket do you?

A N[illegible] just what it looks like, —

Q 74 Well, we don't want your opinion, we want to know if you know what was on that jacket, —

GEN. SMITH: We are going to object to a question like this, —he can give his opinion, —

THE COURT: I think his opinion is all he could give, —

MR. MADDOX: I asked him if he knew, —

THE COURT: He can ask him whether he knows or not, he can state, —the only way he would know would be proof of what he actually saw, —

Q 75 Do you know if that was blood stains or not?

A Not through a chemical analysis I wouldn't know,—

Q 76 So you do not know?

A No sir, I don't.

Later in the trial, Attorney General Williams himself questioned another law officer who had participated in the investigation, and the following testimony was given:

Q 6 All right, just describe this jacket that Onie Lee was wearing?

A There was blood spots on the right side of the jacket.

Q 7 They appeared to be blood stains to you?

A Yes sir.

Mrs. Hilliard testified on her own behalf to the effect that if there was any blood on her jacket, it was hog blood and not human blood.

[6]

Mrs. Hilliard was convicted of second degree murder and sentenced to twenty years' imprisonment. On April 15, 1971, the Tennessee Court of Criminal Appeals reversed the conviction on the grounds that the evidence was "unconvincing" and insufficient to support the verdict and that some gruesome photographs of the victim had been exhibited to the jury. *Hilliard v. State*, No. 3 (Tenn. Crim. App., Apr. 15, 1971, unreported). Although the court did not pass on the propriety of withholding the F.B.I. laboratory report, it did discuss the effect of the testimony about the stains on Mrs. Hilliard's jacket:

> Of quite devastating impact tending to show guilt was the fact that the defendant had what appeared to be blood stains on her jacket. The State introduced proof of this, and then it was revealed that the jacket itself had been sent to the F.B.I. laboratory in Washington, D.C. for chemical analysis and, although some three months had passed since the jacket had been taken from the defendant, it had not been returned for use at the trial; nor was there any information available to shed light on the vital issue of whether the blood was human as theorized by the State or hog as theorized by Mrs. Hilliard.

Although, as aforesaid, no opportunity was allowed the trial court to correct any error that might have been involved in allowing the State's proof concerning the blood being on the jacket when it developed that the jacket itself was, by State action, unavailable, and thus we cannot consider the propriety of the court's rulings on the objections made during trial; the impact of this testimony does enter into our decision. The proof

offered by the State relative to this blood was circumstantial as was all the other. But here there was an opportunity to make available to the jury direct proof, in the face of the defendant's testimony that the blood was that of a hog, that would have supported one theory and discredited the other. Either the blood was human or swine. If it had been established as human, this would have left little

[7]

room for doubt that the defendant was not telling the truth in her explanation of how she got blood on her clothing. If it developed that the blood was from a hog, this would have proved conclusively that she was telling the truth, in this particular at least.

Certainly the two hypotheses suggested by the proof of blood on the jacket—one tending strongly to suggest guilt, the other tending to support the theory of the defendant—are equally reasonable. In its present condition the evidence offered by the defendant buttressed by the presumption of innocence never overcome by sufficient proof preponderates against the verdict.

Mrs. Hilliard was retried and acquitted in May 1971, having served about one year in the penitentiary. At the second trial she had the benefit of the F.B.I. report, which was duly admitted into evidence.

Mrs. Hilliard filed her complaint in the District Court on May 11, 1971, essentially alleging the facts as outlined above. Initially, the court granted defendant Williams' motion to dismiss on the basis of quasi-judicial immunity. In an earlier appeal, we reversed the dismissal and remanded for trial, holding that the complaint charged Attorney General

Williams with acts that were "outside his quasi-judicial capacity and beyond the scope of 'duties constituting an integral part of the judicial process.'" *Hilliard v. Williams*, 465 F.2d 1212, 1218 (6th Cir.), *cert. denied*, 409 U.S. 1029 (1972).

On remand, the District Court conducted a nonjury trial and set forth findings of fact and conclusions of law in an unreported memorandum opinion. In essence, the District Court found that Williams acted "unwisely and improperly" in failing to disclose the substance of the exculpatory F.B.I. report. The court apparently also held that Agent Clark did not fully discharge his duty to refrain from giving evasive or misleading testimony. Nevertheless, the court con-

[8]

cluded that the defendants' conduct had not deprived Mrs. Hilliard of her constitutional rights and that it had not been shown that the defendants' acts were the direct and proximate cause of Mrs. Hilliard's conviction and incarceration. Despite its conclusions, the court awarded nominal damages of $1.00 against each defendant and taxed costs against Williams.

All of the parties now appeal from the judgment of the District Court. Plaintiff argues that she is entitled to more than nominal damages. Defendants insist that in view of the District Court's finding that plaintiff was not deprived of her constitutional rights, even a nominal award is unwarranted.

After a review of the record, we are unable to agree with several of the court's conclusions of law. In Conclusion No. 4, the District Court stated that Attorney General Williams "advised Donn Clark not to mention the report at

the first criminal trial unless specifically called for, and thus, we conclude that Clark acted under 'advice' of Counsel, Williams." It is unclear to us whether the District Court viewed Clark's reliance on Williams' advice as an effective defense in this civil rights action. Nevertheless, we think it plain that a law enforcement officer who knowingly gives evasive, misleading, and deceptive testimony during a criminal trial cannot escape civil liability that otherwise would attach merely because the prosecuting attorney instructed him to testify as he did. As the District Court pointed out, Clark was under an affirmative duty to refrain from giving evasive or misleading testimony, and the duty did not disappear when Williams advised Clark to avoid mention of the F.B.I. report.

In Conclusion No. 7, the District Court made the following statement:

> 7. Neither of the defendants jointly or severally suppressed any evidence, committed or suborned perjury, or otherwise committed any act or were guilty of any omission which deprived Mrs. Hilliard of any rights guaran-
>
> [9]
>
> teed her by the Constitution of the United States or any Federal statute.

We do not agree with the court's holding on this aspect of the case. Whether guilty or innocent, Mrs. Hilliard had a due process right to a fair trial. Defendant Williams withheld an F.B.I. report indicating that there was no blood on Mrs. Hilliard's jacket. Moreover, Williams failed to prevent or to correct deceptive and misleading testimony given by defendant Clark from which the jury could have

concluded that the jacket was stained with the victim's blood. Further, it appears that Williams actually instructed Clark to testify at least evasively, if not falsely. We believe that by these acts and omissions defendant Williams deprived Mrs. Hilliard of her constitutional right to a fair trial. *Miller v. Pate*, 386 U.S. 1 (1967). *See Giglio v. United States*, 405 U.S. 150 (1972); *Brady v. Maryland*, 373 U.S. 83 (1963); *Napue v. Illinois*, 360 U.S. 264 (1959). It follows that this defendant's conduct also amounted to an actionable violation of 42 U.S.C. §1983.

We hold that the acts and omissions of defendant Clark as outlined above also resulted in depriving Mrs. Hilliard of due process and her constitutional right to a fair trial, under *Brady v. Maryland, supra*. *See also United States ex rel. Moore v. Koelzer*, 457 F.2d 892 (3d Cir. 1972); *Kauffman v. Moss*, 420 F.2d 1270 (3d Cir.), *cert. denied*, 400 U.S. 846 (1970).

As an agent of the Tennessee Bureau of Criminal Identification, Clark was assigned to investigate the murder for which Mrs. Hilliard was convicted at her first trial and acquitted at her second trial. It was he who sent the jacket and curtain to the F.B.I. laboratory for analysis of the suspected blood stains, and later sent them back to Nashville to be forwarded to the F.B.I. for further analysis. In his testimony before the jury he violated his duty to give the complete truth and to avoid deceptive or misleading statements. Although Williams, the District Attorney General, was the official representative of the State of Tennessee in the prosecution of the case, Clark also played an active role in the prosecution.

[10]

In *Brady*, the Supreme Court said:

> We now hold that the supression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution.

The principle of *Mooney v. Holohan* is not punishment of society for misdeeds of a prosecutor but avoidance of an unfair trial to the accused. Society wins not only when the guilty are convicted but when criminal trials are fair; our system of the administration of justice suffers when any accused is treated unfairly. An inscription on the walls of the Department of Justice states the proposition candidly for the federal domain: 'The United States wins its point whenever justice is done its citizens in the courts.' 373 U.S. at 87.

Clark relies upon *Bryant v. Kentucky*, 490 F.2d 1273 (6th Cir. 1974), and *Hurlburt v. Graham*, 323 F.2d 723 (6th Cir. 1963). We are of the view that there are significant distinguishing features between those decisions and the facts of the case at bar.

We hold that the conduct of Clark also amounted to an actionable violation of 42 U.S.C. §1983. *Cf. Jones v. Perrigan*, 459 F.2d 81 (6th Cir. 1972).

In Conclusion No. 13, the following statement appears:

> 13. During the proceedings in question defendant Williams was acting within the scope of his duties as Attorney General and at no time did he go outside the scope of his duties as Attorney General in directing or commanding or ordering the investigating officers or witnesses to present false testimony.

This conclusion is plainly untenable. It is most emphatically not within the scope of a prosecuting attorney's duties to withhold exculpatory evidence and to direct witnesses to give

[11]

misleading and deceptive testimony. *Hilliard v. Williams*, 465 F.2d 1212 (6th Cir.), *cert. denied*, 409 U.S. 1029 (1972); *see* ABA CODE OF PROFESSIONAL RESPONSIBILITY, EC 7-13, DR 7-103(B). The function of a criminal trial is to discover the truth, and to that end it is the prosecutor's duty to reveal pertinent information, not to hide it. *Brady v. Maryland*, *supra*, 373 U.S. 83, 87 (1963).

As the foregoing discussion indicates, we believe that defendants Williams and Clark violated §1983, for which Mrs. Hilliard is entitled to recover damages. *See Magnett v. Pelletier*, 488 F.2d 33 (1st Cir. 1973); *Basista v. Weir*, 340 F.2d 74, 87 (3d Cir. 1965); *Sexton v. Gibbs*, 327 F. Supp. 134, 142 (N.D. Tex. 1970), *aff'd*, 446 F.2d 904 (5th Cir. 1971), *cert. denied*, 404 U.S. 1062 (1972). The complaint, however, prayed for both punitive and compensatory damages. The award of punitive damages is a matter within the discretion of the trier of fact, and the scope of appellate review is accordingly narrow. *See Stolberg v. Board of Trustees*, 474 F.2d 485, 489 (2d Cir. 1973); *Donahue v. Staunton*, 471 F.2d 475, 482 (7th Cir. 1972), *cert. denied*, 410 U.S. 955 (1973); *Lee v. Southern Home Sites Corp.*, 429 F.2d 290, 294 (5th Cir. 1970). In this case we see no basis for disturbing the District Court's refusal to award punitive damages.

A more difficult question is presented by the lower court's failure to grant compensatory damages. The court concluded that Mrs. Hilliard had not shown a sufficient causal connection between the defendants' improper acts and her murder conviction and subsequent incarceration. In Conclusion No. 8, the District Court made the following statement:

> 8. It would amount to speculation and surmise for the Court to conclude that the absence (whether deliberate or otherwise) of the F.B.I. report of March 26, 1970, or the absence of the curtains and jacket, affected the outcome of the May, 1970, trial. There was considerable evidence to warrant a finding of guilty on the record in any event.

[12]

To the same effect is Conclusion No. 12:

> 12. Plaintiff has failed to show that any wrongful act of Clark or of Williams proximately and directly caused Mrs. Hilliard to be convicted of murder in the second degree at the May, 1970 trial or to suffer imprisonment on that account in view of other substantial variances in the proof adduced at the two trials.

Further, the District Court stated that the award of nominal damages was made despite "the failure to show that such mistaken or improper acts as and if involved on the part of either defendant were a direct and proximate cause of any imprisonment or damages."

In our opinion, Mrs. Hilliard has shown by a preponderance of the evidence that Attorney General Williams' and T.B.I. Agent Clark's wrongful acts and omissions were a proximate cause and a cause in fact of her conviction and

imprisonment pursuant to her conviction. Proximate cause, which must be distinguished from factual causation, frequently becomes an issue in negligence actions and usually is analyzed in terms of the foreseeability of the injury that actually occurred. *See Lancaster v. Montesi*, 216 Tenn. 50, 390 S.W.2d 217 (1965). *See generally* W. PROSSER, TORTS 244-90 (4th ed. 1971). Assuming the concept is applicable to this case, we believe that it presents no problem. Mrs. Hilliard's conviction and confinement were not only foreseeable consequences of the defendants' conduct, they were without doubt also the intended results.

It appears that this case really turns upon the issue of causation in fact. We therefore are faced with the question of whether Mrs. Hilliard sustained her burden of proving it to be more likely than not that Attorney General Williams' and T.B.I. Agent Clark's conduct was a substantial factor and a material element in bringing about her conviction and imprisonment. *See Lancaster v. Montesi*, 216 Tenn. 50, 390 S.W.2d 217 (1965); *Carney v. Goodman*, 38 Tenn. App. 55,

[13]

270 S.W.2d 572 (1954); W. PROSSER, TORTS 239-41 (4th ed. 1971). The District Court treated the question as one of law and answered it in the negative. We disagree.

As the Tennessee Court of Criminal Appeals noted, the testimony about blood on Mrs. Hilliard's jacket was "[o]f quite devastating impact." Such evidence would have been highly significant to a jury presented with a violent crime involving axe and shotgun wounds. Furthermore, the other evidence presented against Mrs. Hilliard was wholly circumstantial and sufficiently unconvincing that it could not

sustain a verdict of guilty under Tennessee law. It is also important that at the second criminal trial, when Mrs. Hilliard had the benefit of the exculpatory F.B.I. report, she was found not guilty. There were, to be sure, other differences between the two trials, and thus the subsequent acquittal in and of itself does not foreclose the causation issue in Mrs. Hilliard's favor. Nevertheless, the acquittal upon retrial is probative evidence tending to establish that Attorney General Williams' and T.B.I. Agent Clark's conduct was a cause in fact of Mrs. Hilliard's injuries.

No one can ever be certain that Hilliard would not have been convicted if defendants had acted properly in all respects. The law, however, does not place such a heavy burden on the plaintiff. This is a civil case, and plaintiff need only show by a preponderance of the evidence that defendants' conduct was a substantial factor in bringing about the injuries suffered. We are convinced that Mrs. Hilliard has met this burden.

On remand, the District Court should determine the amount of compensatory damages to which Mrs. Hilliard is entitled as a result of her conviction and one-year confinement in prison. This does not include imprisonment prior to conviction.

The judgment of the District Court is reversed and the case is remanded for further proceedings consistent with this opinion.

[14]

The Supreme Court has granted certiorari in *Imbler v. Pachtman*, 500 F.2d 1301 (9th Cir. 1974), *cert. granted*, 43 U.S.L.W. 3465 (Feb. 24, 1975). It is suggested that

the District Court postpone further proceedings in the present case until after the Supreme Court has announced its decision in *Imbler*.

The costs of this appeal are assessed against John L. Williams and Donn Clark.

APPENDIX B

In The
UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TENNESSEE
EASTERN DIVISION

FILED
NOV 2 1973

LILLY MAE ONIE LEE WHITELAW HILLIARD,
Plaintiff,

v.

NO. 2073

JOHN L. WILLIAMS and DONN CLARK,
Defendants.

MEMORANDUM OPINION

F A C T S

1. On about February 19, 1970, Ernie Price was murdered in Carroll County, Tennessee, and the plaintiff herein, Mrs. Hilliard, was charged with the crime. She was arrested on February 19, 1970, indicted on May 4, 1970, for murder in the first degree, arraigned on May 8, 1970, and tried on May 12 and 13, 1970. She was found guilty of murder in the second degree on May 13, 1970, and sentenced to serve twenty years in the State Penitentiary. Upon appeal to the Court of Criminal Appeals of Tennessee, the conviction was reversed and the case remanded; and upon retrial Mrs. Hilliard was found not guilty on May 12, 1971, and immediately discharged. Mrs. Hilliard was in

pretrial confinement in Carroll County, Tennessee, from February 19, 1970, to May 13, 1970, and was in state custody pursuant to her conviction from May 13, 1970, through May 12, 1971.

2. Defendant Williams is a District Attorney General for the 22nd Judicial Circuit which includes Carroll County, Tennessee, and pursuant to his duties represented the State of

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Tennessee in the case of the *State of Tennessee v. Lilly Mae Onie Lee Whitelaw Hilliard* in the Circuit Court of Carroll County, Tennessee, which criminal case is a basis of the present action. The defendant Donn Clark is an agent of the State of Tennessee, Bureau of Criminal Identification who was assigned to assist Carroll County authorities in the investigation of the death of Ernie Price.

3. The deceased, Ernie Price, was married to Vina Price, a sister of Mrs. Hilliard's deceased mother; and thus, Mrs. Hilliard and the deceased were neice and uncle respectively by marriage. Vina Price and Mrs. Hilliard's mother had inherited about seventy (70) acres of real estate in Carroll County, Tennessee, and they were apparently tenants in common, since Mrs. Hilliard took her mother's part. In December of 1969, Mrs. Hilliard came to Tennessee from her home in Elkhart, Indiana, to have her share of the real estate set aside to her; however, a dispute arose and persisted between Ernie Price and Mrs. Hilliard concerning the property. Ernie Price was claiming an interest in the real estate by reason of adverse possession or prescription contrary to the claim of Mrs. Hilliard. Mrs. Hilliard employed an attorney, Mr. Dwayne D. Maddox,

to pursue and protect her interest. She apparently remained in Carroll County until the matter could be settled.

4. On February 19, 1970, between about 10:00 A.M. and 12:00 Noon, Ernie Price was found brutally murdered with his body leaning against the back door of his home. He had a shotgun wound about the mouth, one or two severe axe type wounds about the head, any of said wounds being sufficient to have caused his death. The circumstances surrounding the crime strongly indicated that the

[3]

murder had actually taken place inside the Price home and the body thereafter removed to the outside in an effort to conceal the true circumstances surrounding the homicide.

5. Mrs. Hilliard made both judicial and extrajudicial stateme .ts to the effect that immediately prior to the homicide that the deceased became enraged, threatened and chased her with a shotgun; that she ran from the home to the nearby home of the Nesbitt's; that while she was en route from the Price home to the Nesbitt home she heard a gun blast; and that upon reaching the Nesbitt home and upon the suggestion of Mr. Nesbitt, she contacted her attorney, Mr. Maddox. She did in fact call Mr. Maddox who in turn notified the authorities.

When Hilliard arrived at the Nesbitt home following her flight from the Price home as well as at the time of her arrest on the day of the murder, she was wearing a blue windbreaker type jacket that had upon it some small spots resembling blood. The local officers, including defendant Clark, theorized that the spots were the blood of Ernie Price; and they later learned from Mrs. Hilliard or her counsel that her position was that the spots, if blood at all,

were animal or hog blood. Clark, moreover, seized the jacket as evidence and likewise seized some curtains from inside the house of Ernie Price upon which there were spots resembling blood. On or about March 9, 1970, Clark forwarded the jacket and the curtains to the F.B.I. laboratory in Washington, D.C. for analysis to learn if the spots were blood and, if so, whether the blood was human or animal. The F.B.I. report dated March 26, 1970, was received shortly after that date by Clark and indicates, "No blood identified on Q1 (jacket) or Q2 (curtains)." Clark also received the jacket

[4]

and the curtains from the F.B.I. laboratory by separate package shortly after receipt of said report. The report was considered by Clark and the Carroll County Sheriff to be inconclusive, particularly in view of the fact that Mrs. Hilliard herself was taking the position (and did in fact testify at the trial) that the spots upon the jacket might consist of hog blood. Clark on or about April 28, 1970, forwarded the curtains and jacket to the Nashville Office of the Tennessee Bureau of Criminal Identification to be in turn forwarded to the F.B.I. laboratory in Washington for further analysis.

6. A preliminary hearing was afforded the accused on February 27, 1970, in the General Sessions Court of Carroll County, Tennessee, at which time there was evidenced the jacket of the accused, along with certain curtains taken from the home of the victim. The defendant, Clark, stated during or after the hearing that he would submit both the jacket of the accused and the curtains to a laboratory for examination and analysis to determine if blood were present. There was disagreement as to whether Clark, employed by the

Tennessee Bureau of Criminal Investigation, also agreed at the same time to inform counsel for the accused when such a report had been returned to him. In any event, Clark did not agree to release the contents of the report when received. The defendant, John L. Williams, actively participated in this preliminary hearing as the prosecuting attorney, after which Hilliard was called upon to stand trial before a jury in the Carroll County Circuit Court.

[5]

7. Prior to the date of the first criminal trial of the accused, the defendant, Donn Clark, discussed the F.B.I. laboratory report of March 26, 1970, with the defendant, John L. Williams, though he did not show it to Williams. The first such brief discussion occurred in the Carroll County Courthouse shortly after the receipt of the report, and included both defendants and Donald Akin, the Sheriff of Carroll County, Tennessee. Another discussion occurred just before the first criminal trial of the accused when the defendant, Donn Clark, went to the office of the defendant, John L. Williams, with his investigative file to discuss, among other things, whether the report of March 26, 1970, would have to be produced at the trial.

8. Mrs. Hilliard was arraigned on May 8, 1970, at which time the trial date of May 12 was set. At the time of the trial the jacket was in the Nashville Office of the Tennessee Bureau of Identification, although Clark believed that it had been forwarded to the F.B.I. laboratory in Washington. The curtains were forwarded to the F.B.I. laboratory, but for some reason not clear from the record, the jacket was not forwarded, but remained in Nashville, unknown to Clark and Williams.

9. Prior to the commencement of the first criminal trial of the accused, defendant, John L. Williams, instructed the other defendant, Donn Clark, who was to be a witness not to bring up this report unless it were specifically called for.

10. Testimony was elicited on the first trial of the accused from the defendant, Donn Clark, and the State's witness, Donald Akin, the Sheriff of Carroll County, to the effect that in their opinion there were spots on both the jacket of the accused

[6]

and the curtains that "looked like" and/or "appeared to be" blood.

11. There was other testimony by the defendant, Donn Clark, and the State's witness, Donald Akin, the Sheriff of Carroll County, in the first criminal trial that was misleading and evasive as to the existence or availability of any report of the examination or analysis of the jacket of the accused, or the curtains, or as to the return of the jacket and curtains from the F.B.I. laboratory. No specific question was asked about any such report indicating negative as to existence of human blood. [2]

12. At the 1970 trial, Clark and Sheriff Donald Akin of Carroll County testified in substance that the jacket had spots on it which appeared to be blood. Mrs. Hilliard likewise testified at the first trial that the jacket had spots on it which might be blood, but were hog blood.

13. After trial and sentencing of Mrs. Hilliard, the F.B.I. laboratory reported on or about May 28, 1970, that

[2] See attachment hereto as footnote No. 2.

the stains on the curtains had been analyzed and found not to be blood but rather a varnish stain.

14. Pending the appeal of the first criminal trial to the Tennessee Criminal Court of Appeals, requests were made of both defendants by Mrs. Hilliard's counsel as to whether any report of the analysis of the jacket and curtains had yet been received by the prosecution. A negative response was indicated. A written motion seeking the production of any analysis report, when and if received, as well as the jacket and the curtains themselves, was filed on August 3, 1970, in the Tennessee Court of Criminal Appeals and a copy forwarded to the defendant, John L. Williams.

15. The Tennessee Court of Criminal Appeals in a

[7]

written opinion on April 15, 1971, reversed the conviction of the accused purportedly on the grounds that the circumstantial evidence adduced at the first criminal trial did not conclusively prove guilt and exclude all reasonable hypotheses of innocence as the law required. The Court further, however, noted that the testimony elicited from the State's witnesses at the first trial to the effect that the stains on the jacket of the accused were blood, was of "devastating impact tending to show guilt;" "that the jacket itself was by State action unavailable;" and, that there was not "any information available to shed light on the vital issue of whether the blood was human, as theorized by the State, or hog, as theorized by Hilliard."

16. On or about April 20, 1971, after the opinion of the Tennessee Court of Criminal Appeals was released, the defendant, John L. Williams, appeared in open Court and delivered the jacket of the accused and copies of all

correspondence and reports between the prosecution and the F.B.I. laboratory to counsel for the accused.

17. On May 12, 1971, the second trial of the accused commenced in the Circuit Court of Carroll County, and concluded in an acquittal on May 13, 1971.

18. There was a substantial amount of circumstantial evidence presented at the first (May 1970) trial entirely apart from the curtains or the jacket strongly indicating the guilt of Mrs. Hilliard, including the following matters:

a. Mrs. Hilliard had a motive to kill since she was involved in a serious dispute with the deceased.

b. Just before the homicide the deceased and

[8]

Mrs. Hilliard were engaged in a controversy of such gravity (according to the testimony of Mrs. Hilliard) that the deceased threatened and chased Mrs. Hilliard with a shotgun.

c. Mrs. Hilliard's shoe was found a few feet from the body of Ernie Price and when she arrived at the Nesbitt house one of her shoes was missing.

d. Following Mrs. Hilliard's flight to the Nesbitt home, she contacted her lawyer almost immediately.

e. Mrs. Hilliard's behavior and demeanor, following her flight from the Price home, indicated that she knew both that Ernie Price was dead, and the whereabouts of his body.

f. The evidence indicates and counsel for all parties concede that the murder was either committed by Vina Price, the widow, or Mrs. Hilliard. Mrs. Price was

a person mentally weak if not totally incompetent; the murder was committed by a person of some physical strength, and Mrs. Price was elderly and feeble. Mrs. Price had no motive for killing her husband, and had lived with him for many years without ever attempting to harm him.

g. Mrs. Hilliard gave testimony at the trial to the effect that when she fled the Price home, that Mrs. Price was in the house; however, the children of Ernie Price testified at the trial that Mrs. Hilliard told them an inconsistent version that when she fled the house Mrs. Price was not in the house, but out by "the old house place," some several hundred yards away.

19. The evidence presented at the second trial was substantially different from that presented at the first trial in several significant particulars:

a. Certain rather gruesome photographs, including

[9]

those of the body, which were exhibited to the jurors at the first trial, were not so exhibited at the second trial.

b. The family of Ernie Price did not appear nor render support to the prosecution case at the second trial as at the first trial.

c. The sons of Ernie Price did not testify at the second trial as they did at the first trial to the effect that Mrs. Hilliard had made certain conflicting statements to them concerning the whereabouts of Vina Price at the time Mrs. Hilliard fled the Price home.

d. At the second trial, Mrs. Hilliard testified that the jacket had no blood on it but that if it did have blood

on it, it was hog blood, whereas she testified at the first trial to the effect that the jacket did have hog blood on it. (In effect, she then had the benefit of the report).

20. At no time did Mrs. Hilliard or her counsel make an effort to have the Court set bond or to make bond though she claimed to own an interest in a seventy (70) acre tract of land in Carroll County, Tennessee, (conveyed to her counsel to be applied on his fee).

21. Prior to the trial of May 1970, counsel for Mrs. Hilliard took no legal steps aimed at discovering the results of any test that may have been carried out in connection with the jacket or the curtains, though he knew that the items were being submitted for analysis; and he made no pre-trial formal or informal requests of either of the defendants in connection with the jacket or the curtain or any reports that may have been received upon them.

22. There is some question as to whether the F.B.I. report in and of itself would have been admissible as evidence in the absence of an F.B.I. laboratory technician personally.

[10]

CONCLUSIONS

1. The rule of law prevailing in the State of Tennessee at the time of the first criminal trial concerning the weight and sufficiency of circumstantial evidence alone necessary to sustain a criminal conviction was that such circumstances must be consistent with guilt and inconsistent with innocence and must exclude every other reasonable hypothesis save the guilt of the criminally accused beyond a reasonable doubt. *Hicks v. State*, 490 S.W.2d 174; *Patterson v.*

State, 475 S.W.2d 201 and *Harris v. State*, 457 S.W.2d 370, *cert. denied*, 401 U.S. 978, 91 S.Ct. 1206, 28 L.Ed. 2d 328.

2. The defendant, John L. Williams, as District Attorney General of the 22nd Judicial Circuit, has the ultimate responsibility for the preparation and presentation of all criminal proceedings in the 22nd Judicial Circuit and this responsibility entails a two-fold duty in that he is to prosecute the guilty and protect the innocent. *Giles v. Maryland*, 386 U.S. 66, 87 S.Ct. 793, 197 L.Ed.2d 737; *Branch v. State*, 469 S.W.2d 533, 1969.

3. The defendant, John L. Williams, as District Attorney General, had an affirmative duty: (1) to disclose to the accused or her counsel material exculpatory evidence and any information favorable to the defense of the accused or which might be useful to the defense. *Giles v. Maryland*, *supra*; *Brady v. Maryland*, 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215; (2) to correct false or erroneous evidence when it appears in the trial of a criminal case. *Napue v. Illinois*, 360 U.S. 264, 79 S.Ct. 1173, 3 L.Ed. 2d 1217; and (3) to not take any advantage of an accused by preventing their access to testimony favorable to their case, or by any trick or fraud whatever, prevent an accused from learning of evidence favorable

[11]

to their case. *Eason v. State*, 65 Tenn. 431 (1873); *Robert v. State*, 489 S.W.2d 263 (1972) (J. Dwyer's Dissent).

4. The defendant, John L. Williams, as District Attorney General, acted unwisely and improperly in failing to disclose to the accused or her counsel the substance of

the report as to blood examination. He was also negligent in not being aware that the testimony of certain State's witnesses upon the first criminal trial was misleading and evasive or else he acted improperly in this respect. He advised Donn Clark not to mention the report at the first criminal trial unless specifically called for, and thus, we conclude that Clark acted under "advice" of Counsel, Williams. See the canons of professional ethics: EC7-13, EC7-26, and EC7-27, and *Hilliard v. Williams*, 465 F.2d 1212 (6th Cir. 1972).

5. The defendant, Donn Clark, as an investigating agent for the State, was also under an affirmative duty to refrain from perjury and misleading or evasive testimony calculated to suppress evidence and/or to mislead the jury as to the significance of the spots on the jacket of the accused. He did not, however, in our judgment willfully and corruptly testify falsely so as to violate the perjury laws of Tennessee.

6. The plaintiff has failed to carry the burden of proving any conspiracy between the defendants Clark and Williams to suppress evidence, present perjured testimony, or in any way to deprive Mrs. Hilliard of any rights guaranteed her by the Constitution of the United States or any Federal Statute.

7. Neither of the defendants jointly or severally suppressed any evidence, committed or suborned perjury, or otherwise

[12]

committed any act or were guilty of any omission which deprived Mrs. Hilliard of any rights guaranteed her by the Constitution of the United States or any Federal Statute.

8. It would amount to speculation and surmise for the Court to conclude that the absence (whether deliberate or otherwise) of the F.B.I. report of March 26, 1970, or the absence of the curtains and jacket, affected the outcome of the May, 1970, trial. There was considerable evidence to warrant a finding of guilty on the record in any event.

9. A substantial basis for the reversal by the Court of Criminal Appeals were the actions of the trial Judge with respect to admission of gruesome photographs and the matters pertaining to circumstances of the jacket, the curtains and the F.B.I. reports relative thereto which were brought to that Court's attention, at least by motion.

10. It would also be a matter of speculation and conjecture to conclude that the testimony given by defendant Clark at the May, 1970 trial effected its outcome insofar as the jacket and curtains are concerned.

11. The testimony given by defendant Clark at the May, 1970 trial must be considered in relation to that of Mrs. Hilliard and of Sheriff Donald Akin, with respect to whether or not there was human or animal blood, or otherwise, on the jacket.

12. Plaintiff has failed to show that any wrongful act of Clark or of Williams proximately and directly caused Mrs. Hilliard to be convicted of murder in the second degree at the May, 1970 trial or to suffer imprisonment on that account in view of other substantial variances in the proof adduced at the two trials.

[13]

13. During the proceedings in question defendant Williams was acting within the scope of his duties as Attorney General

and at no time did he go outside the scope of his duties as Attorney General in directing or commanding or ordering the investigating officers or witnesses to present false testimony. He was unwise and acted improperly in allowing the impression to be left that there was no F.B.I. report bearing upon the existence or non-existence of blood on the jacket or curtains (even though allegedly "inconclusive").

14. Defendant Williams did not deliberately or willfully suppress evidence. He knew about the first report, however, and should have revealed the substance of this to Hilliard or her attorney in light of all the circumstances, as it could well have been considered by the jury to have been exculpatory.

15. There was considerably more probative evidence pointing to the guilt of Hilliard beside the alleged blood stained jacket and curtains. Reasonable inferences could well have been drawn from all the proof and evidence, primarily circumstantial in nature, indicating that she had committed the vicious and brutal act in controversy.

16. The aged widow, Vina Price, might apparently have been produced at the first trial, though she was concedely feeble-minded and her competence was subject to question. Whether a year later her physical and mental condition or physical location would have made her available or of any assistance at a trial is not known.

17. Plaintiff has failed in her burden to prove that either defendant willfully either separately or by collusion or conspiracy prevented testimony favorable to the accused Hilliard or acted

[14]

fraudulently in order to "frame" or unjustifiably attempt to convict the accused Hilliard. She has also failed in her burden to prove that the acts of the defendants, if and whether mistaken, negligent, or deceitful, were the direct and proximate cause of her conviction and confinement.

Under all the circumstances, plaintiff is awarded nominal damages of $1.00 as to both defendants, Clark and Williams, despite the failure to establish willful, deliberate and fraudulent concealment of evidence or perjury, and the failure to show that such mistaken or improper acts as and if involved on the part of either defendant were a direct and proximate cause of any imprisonment or damages.

Plaintiff's civil rights have not been demonstrated to have been violated by defendants in reasonable relationship to any showing of damages.

Costs of the cause are assessed against defendant Williams.

This 2nd day of November, 1973.

HARRY W. WELLFORD
UNITED STATES DISTRICT COURT JUDGE

Footnote [2] The following questions and answers were elicited from Clark: (pp. 51, 56, 63 and 64, Tr.)

Q 66	Did you proceed to inspect the living room furniture then?
A	Yes sir, I found what looked to be blood stains on the arm of the arm chair, on the north side of the house, sort of behind the stove, —
Q 67	All right, go ahead?
A	Also found blood stains on the floor in front of the chair, and some on the curtains behind the stove, then on the back of the couch on the north wall of the living room, the wall looked wet, as if it had been washed behind the couch there.
Q 110	Was that the way she was dressed when you took the picture of her?
A	Yes, that was made at the jail.
Q 111	What kind of coat is that?
A	A blue nylon windbreaker type coat.
Q 112	All right, did you find any blood stains on that?
A	Yes sir, I found some spots on it.
Q 113	What did they appear to be?
A	They appeared to be blood stains.
Q 114	Where were they?

[14]

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A	Yes sir, I found some spots on it.
Q 113	What did they appear to be?
A	They appeared to be blood stains.
Q 114	Where were they?

A They were on the right tail of the coat, right front of the coat.

CROSS EXAMINATION OF DON CLARK, BY MR. MADDOX:

Q 59 Did you have the curtains analyzed?

A I sent them off to the F.B.I. lab and they aren't back yet.

Q 60 You don't have the curtains back?

A No sir.

[page two]

Q 61 Let's talk about this jacket, —you put in some very dangerous evidence against the defendant, by saying she had bloodstains on her jacket —do you know they were blood stains?

A I said they looked like blood stains.

Q 62 How large were they, Mr. Clark?

A They were small—

Q 70 Mr. Clark, where is that jacket today?

A At the F.B.I. lab in Washington.

Q 71 Why didn't you make it available here for us so that the jury could see those spots on that jacket and determine if it was blood?

A They just didn't send it back.

Q 72 Have you had any reports that there was human blood on that jacket?

A No, not at this time.

Q 73 But you don't know what was on that jacket do you?

A No, just what it looks like, —

Q 75 Do you know if that was blood stains or not?

A Not through a chemical analysis I wouldn't know, —

Q 76 So you do not know?

A No sir, I don't.

The following were elicited from Sheriff Akin (pp. 114, 116, 117 and 118, Tr.):

Q 1 Did you take any scrapings off the spot that you saw in there that you have identified as blood spots?

A No sir, I did not.

Q 2 Do you know what that spot was?

A It looked to me like it was blood.

[page three]

Q 3 Do you know?

A No sir, —

Q 4 You have no laboratory report telling you what it is?

A No sir, and I still wouldn't know if they gave me a report, —but it looked like blood.

Q 6 All right, just describe this jacket that Onie Lee was wearing?

A There was blood spots on the right side of the jacket.

Q 7 They appeared to be blood stains to you?

A Yes sir.

RE-CROSS EXAMINATION BY MR. MADDOX:

Q 1 Where is that jacket today?

A Mr. Clark sent it to the F.B.I.

Q 2 Why don't you have it here to show this jury, so they can look at those spots, and see as to whether or not they were blood or not?

A It hasn't come back, —sometimes things get delayed, Mr. Maddox, we wanted it back,— but we didn't get it back.

Q 7 Now, Sheriff, I challenge that statement— I challenge you to get that jacket, —

Gen. Williams: Your Honor, please, I am going to object to that, —he has explained that the jacket has gone to Washington and hasn't got back, —we have no control, —

Mr. Maddox: Your Honor, at this time I am going to ask

[page four]

for a continuance of this trial until that jacket gets back, —I think it is most material evidence in this case, —I have seen the jacket and I know what the evidence is, —

The Court: If you have seen the jacket you can testify here, as to what you have seen, —no I am not going to continue this case.

Mr. Maddox: Your Honor, please, I believe it is most prejudicial to, —this defendant, — it is opinion evidence and is not admissible in the first place, —

The Court: Well, he can testify as to what he saw and you can testify as to what you saw, —

Mr. Maddox: Your Honor is not going to put me in a position to have to testify in a case that I am trying, —

The Court: If you saw it and desire to do so I am going to let you do so, —I am not going to continue this case, —

Mr. Maddox: Apparently the State, Your Honor, please is hiding some evidence somewhere, —

Mr. Lassiter: If the Court please, I object to that statement, —I ask the Court to instruct the jury that this is, —

The Court: Gentlemen, lets disregard that last remark, —that is something that you can argue to the jury if you want to.

rulings on the objections made during trial; the impact of this testimony does enter into our decision. The proof offered by the State relative to this blood was circumstantial as was all the other. But here there was an opportunity to make available to the jury direct proof, in the face of the defendant's testimony that the blood was that of a hog, that would have supported one theory and discredited the other. Either the blood was human or swine. If it had been established as human, this would have left little room for doubt that the defendant was not telling the truth in her explanation of how she got blood on her clothing. If it developed that the blood was from a hog, this would have proved conclusively that she was telling the truth, in this particular at least.

"Certainly the two hypotheses suggested by the proof of blood on the jacket—one tending strongly to
[fol. 3] suggest guilt, the other tending to support the theory of the defendant—are equally reasonable. In its present condition the evidence offered by the defendant buttressed by the presumption of innocence never overcome by sufficient proof preponderates against the verdict."

Following her acquittal at the second trial, Mrs. Hilliard filed the present civil action for damages against the District Attorney General. Jurisdiction is asserted both on the ground of diversity of citizenship and under the civil rights act, 42 U.S.C. § 1983 and 28 U.S.C. § 1343(3).[1]

The District Attorney General filed a motion to dismiss pursuant to Rule 12(b)(6), Fed. R. Civ. P. for failure to

[1] The other defendant is the Resident Agent of the Tennessee Bureau of Investigation, who filed an answer in the District Court. He is not a party on this appeal.

state a claim on which relief can be granted. The District Court sustained this motion, holding that the District Attorney General is immune from civil liability. We reverse, holding that the District Court erred in ruling that the complaint does not state a claim on which relief can be granted.

This is an interlocutory appeal under 28 U.S.C. §1292(b). The District Court certified that the order of dismissal involves a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal may materially advance the ultimate termination of the litigation. The District Court also directed the entry of final judgment as to the District Attorney General making an express determination that there is no just reason for delay. Rule 54(b), Fed. R. Civ. P. This court granted leave to appeal.

Our reversal is based entirely upon the factual averments of the complaint, which are summarized hereinafter in this opinion. These averments must be treated as true for purposes of this appeal and are viewed in the light most favorable to Mrs. Hilliard. *Lucarell*
[fol. 4] *v. McNair*, 453 F.2d 837 (6th Cir. 1972), *L'Orange v. Medical Protective Society*, 394 F.2d 57, 59 (6th Cir. 1968). "In appraising the sufficiency of this complaint we follow, of course, the accepted rule that a complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff can prove no set of facts in support of [her] claim which would entitle [her] to relief." *Conley v. Gibson*, 355 U.S. 41, 45-46 (1957).

The complaint avers that Mrs. Hilliard is a citizen of Indiana; on or about December 24, 1969, she arrived in Carroll County, Tennessee, to visit her maternal aunt,

Vina Prince, and the aunt's husband, Ernie Prince; the purpose of her visit was to assert and settle her claim to a one-half interest in certain real estate inherited from her grandmother; Ernie Prince had operated the land for many years and had claimed ownership from time to time; on February 19, 1970, Ernie Prince was killed and Mrs. Hilliard was arrested and charged with his murder.

The complaint further states that at the time of her arrest Mrs. Hilliard was wearing a blue nylon jacket which the officers claimed was stained with the blood of Ernie Prince; the victim was murdered by two vicious axe blows to the skull, and the body thereafter was dragged to the rear of the house and shot in the mouth with a shot gun. Mrs. Hilliard asserted that when she was arrested there was no blood on her jacket, but if there were any such stains it was hog blood from preparing raw meat.

The complaint asserts that circumstantial evidence pointed the finger of guilt to Vina Prince, who is insane. The opinion of the State Court of Criminal Appeals pointed out that Mrs. Prince was not available as a witness, due to her mental condition. The court commented:

> "It is regrettable that she was not available as a witness ... Since there is no doubt that this woman was present before, during, and after the assault of the deceased, her potential as a witness is quite
> [fol. 5] evident. She could have witnessed the crime or have committed the crime herself."

It is averred that the only probative material evidence against Mrs. Hilliard was the allegedly blood stained jacket and some alleged blood stained curtains; that the jacket and curtains were sent to the FBI laboratory in Washington, D.C., for analysis; that the FBI report

was negative as to human blood, or any blood, being on either the jacket or the curtains; that the District Attorney General saw the FBI report well in advance of the trial and was familiar with its contents; that neither the FBI report nor the jacket and curtains were made available to be introduced in evidence at the trial; that the contents of the FBI report were never divulged to Mrs. Hilliard or her attorney; instead, it was claimed by the prosecution that the jacket and curtains had been resubmitted to the FBI on April 28, 1970, at a time when the trial already had been set for May 15, 1970, too late for them to be returned in time for introduction in evidence; that the District Attorney General produced evidence before the jury to the effect that the spots on the jacket and curtains "looked like" or "appeared to be" blood stains, in spite of the FBI report that there were no blood stains; that the District Attorney General suppressed and concealed the positive proof that there was no blood on either the jacket or curtains; and that if the FBI report had been introduced into evidence, Mrs. Hilliard would have been acquitted at her first trial, as she was at the second.

The complaint further contains these averments:

> "22. That in the preparation of the case, the Defendant Williams advised or suggested or implied by some means that the witness Defendant Clark and perhaps others, should not mention anything about the first report of March 28, 1970, and that the Defendant Clark and other witnesses followed his instructions and answered both direct examination questions and cross-examination questions evasively, deliberately
> [fol. 6] misleadingly, with half truths and in instances falsely, to carry out the complete suppression of the report of negative blood analysis of the items.

"23. That the Defendant Williams to carry out his intention of concealing and suppressing the report, contrary to any interpretation of good practice, and knowing that the defense expected the production of the jacket and report of the examination thereof for human blood, the Complainant insisting that there was no blood or if blood then animal blood, not human, announced that the State was ready for trial, well knowing he was not going to offer the jacket or curtains or the report, and that once the trial had commenced, the Complainant's defense counsel could not obtain the jacket or any report in time to use it for defense evidence in the trial, and thus suppressing and concealing the evidence which would acquit the Complainant.

"24. That the Defendant Williams when the Complainant's defense counsel demanded the production of the jacket, or a continuance until it could be produced, knowingly and deliberately advised the Court that through no fault of the State or prosecutors the jacket was not immediately available, as a witness had testified, when he knew or should have known by diligent inquiry that the same was in the T.B.I. office in Nashville, and would have required only two and one-half (2-1/2) hours to be available, and he well knew that the jacket was deliberately sent off on such a late date that its return by trial date was impossible, and he knew of the materiality of the jacket and report and should have announced its unavailability before commencement of the trial, and by these actions suppressed and concealed the evidence of the jacket and report favorable to the Complainant.

"25. That the Defendant Williams knowingly procured and allowed witnesses such as the Defendant

Donn Clark and perhaps others to mislead and deceive the Jury, Court, and criminal Defendant and her counsel,

when he was aware of stronger evidence than

[fol. 7] that elicited from his witnesses, which was favorable to the criminal defendant, and failed and refused to reveal the favorable evidence and allowed the evidence he knew to be false to form the basis of the Complainant's conviction of murder in the second degree.

"26. That both Defendants continued to suppress and conceal the report from the Complainant's defense counsel, after the trial was concluded, knowing that the same would constitute a basis for a new trial for the Complainant and only disclosed the report when compelled by the opinion of the Court of Criminal Appeals which required that they do so, then revealing the same for the first time the 20th day of April, 1971.

"27. That the Defendants and each of them, by the suppression and concealment, and by trickery, deceit, fraud, unethical practices and conduct for a public official, contrary to their oath of office and in violation of the Defendant's right to a fair trial and due process, were the direct and proximate cause of the Complainant being illegally and unlawfully confined in either the Carroll County Jail or the State Women's Prison in Nashville, and wrongfully deprived of her liberty and freedom, and further the direct and proximate cause of unbelievable mental pain and anguish as a result of being unlawfully and wrongfully imprisoned and branded forever as a convicted murderess, suffered day and night behind prison bars and of her earnings during the period of illegal confinement, which is not yet at an end, but which commenced May 12, 1970.

"28. That thereafter, beginning on the 12th day of May, 1971, the complainant was retried in the Circuit Court of Carroll County, Tennessee, on the charge of murder, the said re-trial being concluded on May 13, 1971, by a jury verdict of not guilty.

"29. That the complainant and her counsel on that re-trial had the use and benefit, knowledge, and probative evidentiary document and report dated
[fol. 8] March 26, 1970, from the F.B.I. Laboratory, to the effect that their scientific examination revealed no evidence of any blood, of any kind, human or animal, and in the said re-trial all material aspects of the proof were the same except as to the said report.

* * *

"32. That the defendants individually, and jointly, by conspiring, combination, consort and agreement did conspire for the purpose of depriving either directly or indirectly, the complainant of the equal protection of the laws and of equal privileges and immunities under the laws; and under color of a state statute, ordinance, regulation, custom and usage of the State of Tennessee, caused the complainant to be subjected to the deprivation of her rights, privileges and immunities secured by the Constitution and laws of the United States, and while so doing were acting under color of state authority, and outside the scope of the jurisdiction of their respective offices, and without authority of law and that such actions were calculated or did, in fact, subject the complainant to a deprivation of her constitutional right to a fair trial and due process of law, and were the direct and proximate cause of the injuries, damages, wrongs and loss of liberty and freedom from May 13, 1970, to May 13, 1971, and as set out above."

It is well settled that a prosecuting attorney, when acting in his official capacity, is immune from suit for damages, provided that his acts are within the scope of his jurisdiction and authorized by law. *Peek v. Mitchell*, 419 F.2d 575, 578 (6th Cir. 1970); *Huribut v. Graham*, 323 F.2d 723, 725 (6th Cir. 1963); *Kenny v. Fox*, 232 F.2d 288, 290 (6th Cir. 1956). *See also Kaufman v. Moss*, 420 F.2d 1270 (3rd Cir. 1970).

However, the immunity of a prosecuting attorney from civil liability is not absolute:

"[A] quasi-judicial officer, such as a prosecuting attorney, who acts outside the scope of his jurisdiction and without authorization of law, cannot shelter
[fol. 9] himself from liability by the plea that he is acting under color of office," *Lewis v. Brautigam*, 227 F.2d 124, 129 (5th Cir. 1955).

In *McCray v. State of Maryland*, 456 F.2d 1, 3 (4th Cir. 1972) the court said:

"The immunity of quasi-judicial officers such as prosecuting attorneys and parole board members derives, not from their formal association with the judicial process, but from the fact that they exercise a discretion similar to that exercised by judges. Like judges, they require the insulation of absolute immunity to assure the courageous exercise of their discretionary duties. Where an official is not called upon to exercise judicial or quasi-judicial discretion, courts have properly refused to extend to him the protection of absolute judicial immunity, regardless of any apparent relationship of his role in the judicial system." (Foot notes omitted)

To like effect see: *Madison v. Purdy*, 410 F.2d 99, 101 (5th Cir. 1969); *Robichaud v. Ronan*, 351 F.2d 533 (9th Cir. 1965). Cf. *Lucarell v. McNair*, 453 F.2d 837 (6th Cir. 1972); *Lynch v. Johnson*, 420 F.2d 818 (6th Cir. 1970); *Manning v. Ketcham*, 58 F.2d 948 (6th Cir. 1932).

See also the order of the Supreme Court denying application for mandamus and certiorari in *Garrison v. Brown*, ——U.S.——, 10 Cr. L. 4226, March 20, 1972, involving an action for civil damages against District Attorney Jim Garrison of New Orleans for his prosecution of Clay Shaw on the charge of conspiring to assassinate President John F. Kennedy.

The Code of Professional Responsibility adopted by the American Bar Association contains the following provisions with respect to the duties of a public prosecutor:

"EC 7-13 The responsibility of a public prosecutor differs from that of the usual advocate; his duty is to seek justice, not merely to convict. This sepcial duty exists because: (1) the prosecutor represents
[fol. 10] the sovereign and therefore should use restraint in the discretionary exercise of governmental powers, such as in the selection of cases to prosecute; (2) during trial the prosecutor is not only an advocate but he also may make decisions normally made by an individual client, and those affecting the public interest should be fair to all; and (3) in our system of criminal justice the accused is to be given the benefit of all reasonable doubts. With respect to evidence and witnesses, the prosecutor has responsibilities different from those of a lawyer in private practice; the prosecutor should make timely disclosure to the defense of available evidence, known to him, that tends to negate the guilt of

the accused, mitigate the degree of the offense, or reduce the punishment. Further, a prosecutor should not intentionally avoid pursuit of evidence merely because he believes it will damage the prosecution's case or aid the accused."

"DR 7-103 Performing the Duty of Public Prosecutor or Other Government Lawyer.

(A) A public prosecutor or other government lawyer shall not institute or cause to be instituted criminal charges when he knows or it is obvious that the charges are not supported by probable cause.

(B) A public prosecutor or other government lawyer in criminal litigation shall make timely disclosure to counsel for the defendant, or to the defendant if he has no counsel, of the existence of evidence, known to the prosecutor or other government lawyer, that tends to negate the guilt of the accused, mitigate the degree of the offense, or reduce the punishment."

We hold that factual averments of the complaint as summarized above, considered in a light most favorable to plaintiff, charge the District Attorney General with acts which were outside his quasi-judicial capacity
[fol. 11] and beyond the scope of "duties constituting an integral part of the judicial process." We are not willing to extend the doctrine of quasi-judicial immunity to a complaint charging deliberate supression of an FBI laboratory report establishing the innocence of the defendant.

Nothing in this opinion is intended to express any view as to the merits of the case, which cannot be determined

without an evidentiary hearing. We do no more than hold that the District Judge erred in dismissing for failure to state a claim on which relief can be granted.

Reversed and remanded.